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No. 83-.....

In The
Supreme Court of the United States
October Term, 1983

CHARLES HENDERSON,
Petitioner,

v.

SHELLY KATZ and
TIME, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MARYLAND COURT OF SPECIAL APPEALS

CHARLES HENDERSON
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Oxon Hill, MD 20744
Pro Se

February 29, 1984

QUESTIONS PRESENTED

1. Whether the petitioner's rights under the First Amendment of the United States Constitution were violated when he was prevented from publishing a book of public interest.

2. Whether the petitioner's rights under the Fourteenth Amendment of the United States Constitution were denied when the jury's verdict in his favor was reversed by the Maryland Court of Special Appeals on unfair and insufficient grounds.

PARTIES BELOW

Plaintiffs/appellants in the Maryland Court of Special Appeals were Shelly Katz and Time, Inc. Defendant/appellee in the Maryland Court of Special Appeals was Charles Henderson.

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PETITION FOR A WRIT OF CERTIORARI TO THE MARYLAND COURT OF SPECIAL APPEALS

Charles Henderson petitions for a Writ of Certiorari to review the judgment of the Maryland Court of Special Appeals in this case.

OPINIONS BELOW

The opinion of the Circuit Court for Prince George's County, Maryland, dated July 14, 1982, is unreported and is set forth in Appendix A. The opinion of the Maryland Court of Special Appeals, dated July 5, 1983, is unreported and set forth in Appendix B. The order of the Maryland Court of Special

Appeals, dated September 13, 1983, is set forth in Appendix C. The order of the Maryland Court of Appeals, dated December 1, 1983, on Petition for Writ of Certiorari is set forth in Appendix D.

JURISDICTION

The judgment of the Maryland Court of Special Appeals was entered on July 5, 1983. The order denying the Petition for Writ of Certiorari was entered by the Maryland Court of Appeals on December 1, 1983. This petition is filed within ninety days of the denial. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3)(1966).

STATUTORY PROVISIONS

The pertinent provisions of Article III, Section 2, and Amendment I and Amendment XIV of the United States Constitution are applicable to this case. Also, statutes applicable to the case at the state courts are included for reference: Maryland rules of Procedure, Rules 563 al, 828 bi and i2.

STATEMENT OF THE CASE

This case arises out of a suit by plaintiffs/respondents Shelly Katz and Time, Inc. to restrain defendant/petitioner Charles Henderson from publishing photographic prints received from them and to recover said prints, and concurrently, a countersuit by defendant/petitioner Henderson claiming First Amendment rights, breach of contract and damages. (See Appendix E.)

Time, Inc., through its subsidiary People Weekly Magazine, published an article containing photographs by Katz in November 1977. In contemplation of publishing a book related to the same subject matter. Henderson requested and received from People Weekly a total of 75 reproducible prints in March and April 1978. He paid $525 for print costs.

Although the order form accompanying each set of prints contained a provision requiring the recipient to select prints for use within thirty days, Henderson requested and received repeated extensions on time from Ms. Grygalin, syndication manager for People Weekly. It was understood by both parties that Henderson was purchasing nonexclusive, North American rights to use the selected prints in a trade book. People Weekly's established licensing rates were stated on the forms.

After working over a year on his book and following the receipt of People Weekly's semi-annual inquiry concerning the status of the prints, Henderson completed a rough draft of the book in the Fall of 1979. By telephone on November 30, 1979, Henderson spoke with Ms. Grygalin and asked two questions: (1) Could he still purchase licensing rights to the photographs? and (2) Would the rates on the original order forms hold? Ms. Grygalin answered affirmatively to both questions. Henderson, thereupon, accepted the same precise offer contained in the order forms and designated fifty one prints for use.

In accordance with the terms of the agreement included on the order form, Henderson submitted to People Weekly a confirmed order along with payment of $4,112.50 on December 24, 1979. He, thereby, exercised his part of the transaction and People Weekly were obligated to do likewise. By letter, dated January 2, 1980, Time Inc., rejected Henderson's order and disavowed any agreement. The disposition of a single disputed print was the reason given for the rejection.

At trial, the respondents attempted to show that the offer to use the print in dispute had been withdrawn, but they failed to support this contention with any concrete evidence other than the clearly ambiguous semi-annual status inquiry notice. In addition, the respondents attempted to introduce a, likewise, unsupported contention that the licensing agreement was modified to require the approval of a third party. Such a substantial modification, if it did occur, was not reduced to writings.

Henderson contended and the trial court agreed that the

rejection of his confirmed order was unjustified. The respondents' attempt to alter the agreement to their own advantage came too late. The jury brought a verdict for Henderson and awarded damages.

The respondents based their appeal, as they had done twice before in their motion for summary judgment prior to trial and in their motion for judgment n.o.v. following trial, on the grounds of insufficient evidence to support the existence of a contract. Both motions were denied by the Circuit Court.

The Maryland Court of Special Appeals reversed the trial court's decision and granted to the respondents a judgment n.o.v. Following a denial of a motion for reconsideration, Henderson sought appellate relief at the state court of last resort, the Maryland Court of Appeals. His petition for a writ of certiorari was denied. This petition to the United States Supreme Court followed.

REASONS FOR GRANTING THE WRIT

The federal and nonfederal issues raised in this case are intertwined. A sufficient degree of separation was achieved at trial, but the matter became further entangled by the subsequent decisions and orders of the state appellate courts.

In the pleadings at the court of first instance, the respondents' prayer for injunctive relief and the petitioner's counterclaim of First Amendment rights to publish were clear indications of the seriousness of the matter before the courts. It is well established that a heavy constitutional burden must be met before a restraint on publication can be sustained. *Bantam Books v. Sullivan, 372 U.S. 58, 70(1963).* Also, court orders enjoining publication of matters of public interest have been found to be constitutionally invalid. *Nebraska Press Association v. Stuart, 427 U.S. 539(1976).*

Adjudication of the instant case at trial on nonfederal issues did not diminish the importance of the federal issues, rather it provided a convenient means for settling a threshold question as to the existence of a valid contract between the parties. How-

ever, an overriding principal question may or may not have been settled by that decision.

The contract question can be determined under state law as was adequately accomplished at trial, but the principal question here is whether the respondents acted, without justification, in such a manner as to unfairly deprive Henderson of the right and the opportunity to publish a book comprised of his own material as well as the prints offered by the respondents. If a contact did exist, then his rights automatically follow; moreover, even if the contract was not valid, he was still entitled to fair dealings. The entire publication syndication process hinges on fair and equitable licensing transactions; otherwise, monopolization of matters of public interest, discriminatory practices and anticompetition would abound.

The evidence presented at trial shows that inspite of Henderson's extensive efforts over the period of a year as well as the assurances he received from People Weekly that he could obtain rights to the prints, the respondents, without justification, tried to draw one print into dispute for frivolous reasons; tried to make the approval of a third party a condition precedent to the agreement when none was required; broke off negotiations and reportedly sold exclusive rights to the photographs to said third party; and, brought this suit calling for injunctive relief while Henderson was in the process of negotiating with that third party.

The significance of this first question presented for review is more than a mere dispute over contract matters of how businessmen should conduct their affairs. There is a much more profound reason for raising the question. Where a license permits or regulates activity normally protected by the First Amendment, then it is necessary to guard against unlimited arbitrariness on the part of the grantor of licenses. In a ruling on campus student groups, for example, it was decided that once petitioners had filed an application in conformity with the requirements, the burden was upon the college administration

to justify its decision of rejection. *Healy v. James*, 408 U.S. 169, 92 S.Ct. 2338, 33 L E.2d 266(1972).

In this instant case, the jury did not find the basis for respondents' rejection of Henderson's confirmed order as being compelling. Hearsay testimony regarding a third party's likes and dislikes certainly cannot be considered to be controlling, nor can the respondents' newly formed business relationship interfer or be permitted to interfer with the long standing licensing offer. There was no evidence presented to show irreparable harm, nor was there any evidence to indicate prior legal constraints, or any reason to treat Henderson differently from other persons afforded publishing rights by People Weekly.

The second question presented is closely related to the first. The respondents accomplished on appeal what they could not manage before a jury, namely: blocking a publication right with impunity. The respondents suffered no damages, while the petitioner, Henderson, suffered monetary damages as was shown by the evidence as well as lost profits which could not be calculated. Total costs submitted exceeded $30,000.

Henderson is entitled to equal protection under the law. This is guaranteed by the Fourteenth Amendment of the United States Constitution. The respondents, being of diverse citizenship, were afforded the opportunity to recover the prints from Henderson according to the opinion of the Maryland Court of Special Appeals, but Henderson was not allowed the return of the $525 in earnest money he paid for them, nor damages.

If a contract did not exist, if the original order form became null and void, then on what basis are the respondents entitled to both the money and the prints? The principle of status quo requires that the parties be returned to their original positions as closely as possible. It has been established at trial that the prints, exclusive of licensed rights, are nothing more than copies, pieces of paper with no intrinsic value other than the amount paid to have them reproduced from negatives retained by the respondents.

After reviewing the case, the lower appellate court reasoned that a party to an agreement could not extract that portion it found to be impossible to satisfy and demand compliance with the rest. If this applies to Henderson, then it must also apply to the respondents because the court stated that there was no authority for such behavior. The respondents, rightly or wrongly, found it impossible to go through with the licensing transaction and, yet, still insisted that Henderson comply with the terms of the agreement calling for the return of the prints without refund.

The lower appellate court was of the opinion that a directed verdict should have been entered for the respondents in regard to the prints. The record shows that the respondents never moved for a directed verdict.

Their defective motion was not phrased properly as an explicit request. In Maryland civil litigation, a party moving for judgment n.o.v. must first have filed a motion for a directed verdict at the close of all the evidence and the motion must have been denied. Maryland Rule 563 al. See *Glover v Saunders*, 252 Md. 102, 105, 249 A.2d 156, 158(1969). Furthermore, propriety of the directing of a verdict will not be passed upon where neither the motion or the ruling have been printed by appellant. Maryland Rules 828 bi and i2. See *Caroline v. Reicher*, 269 Md. 125, 137, 304 A2.d 831, 837(1973).

It is clear that the unfair judicial relief afforded to the respondents was prejudicial to the petitioner's rights and privileges. When added to the errors in applying the law, the combined effect is to deny Henderson his right to equal protection under the law.

Aside from the errors mention above, the second question raised also goes to the merits of the case. It is well established that the appellate court's review of fact-finding is limited primarily to cold transcript, while the trial court is in a better position to judge the demeanor and credibility of all witnesses. In disturbing a jury's verdict an appellate court bears a heavy burden of not depriving the nonmoving party of equal protec-

tion of the law. Furthermore, in reviewing the propriety of a jury's verdict, the appellate court must initially view the evidence and all its reasonable inferences in the light most favorable to the prevailing party. See *Menish v. Polinger Co.*, 227 Md. 553, 567, 356 A.2d 233, 240(1976).

"An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the trail court apparently deemed innocent." *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 72 L Ed. 2d S.Ct. 2182(1982).

This is precisely what took place in the instant case. The lower appellate court was of the opinion that Henderson was trying to circumvent conditions precedent added by the respondents on November 30, 1979, because he sent in his confirmed order on December 24, 1979 with payment. Yet, the evidence shows that prior to either of these two dates the respondents did not establish any clear and definite conditions precedent. Henderson stated at trial that discussions with Ms. Grygalin concerning the use of a single print and the requirement for approval by a third party came in the form of a threatened breach after he had accepted the offer outstanding.

The respondents could have set down in writing the new terms alleged to be binding, but did not. Thus, any new terms that might have been added failed for reasons of unclearness and indefiniteness. This was underscored when the respondents' letter of rejection contended that Henderson had agreed not to use the disputed print, when in fact his contemporaneous letters indicated otherwise. Moreover, the letter of rejection made no mention of a requirement for obtaining permission from a third party.

Therefore, the outstanding agreement as set down in the original order form was reinstated on November 30, 1979 by Ms. Grygalin's own admission and was properly executed by Henderson on December 24, 1979. By refusing to execute their

part of the agreement, the respondents carried out their threatened breach on January 2, 1980.

The respondents intended to sell Henderson the rights to the prints, or led him to believe they would, otherwise they would not have agreed to time extensions and to hold the original licensing rates. In reliance of this and in preparation for the license, Henderson expended time and costs which the respondents knew or had reason to know would be expended. Furthermore, even after the breach, Henderson had to effect cover or else lose his investment. He was in the process of doing this when the respondents brought this suit. They were found to be liable for a portion of his damages. *Dialist v. Pulford*, 42 Md. App. 173(1979).

Faced with a paucity of writings to justify their own actions, the respondents attempted to use Henderson's letters against him. His willingness to obtain the voluntary cooperation of all parties throughout the course of the dispute was a test of his own patience as well as his understanding that small businesses have little in the way of negotiating clout under these circumstances. Nevertheless, he held fast to rights he believed to be enforceable, returned only those prints he did not intend to use and always was prepared to sue for the use of the remainder if all other avenues of approach failed. It is apparent that an immediate law suit would not have resolved the matter any sooner, as this protracted litigation has shown.

It is well established that only if no reasonable juror could have concluded as the jury did, may its findings be disturbed. In the instant case, if the appellate court had sought to explain the actions of the respondents, then it would have been apparent to them as it was for the jury that more than one inference could be derived from the evidence. A judgment n.o.v. is then not available. Therefore, based on the law and the facts of this case, the findings of the Maryland Court of Special Appeals must be called into question as to whether they were founded on fair and sufficient grounds or on grounds which, by and of themselves, would constitute a denial of equal protection.

CONCLUSION

For the reason stated, Petitioner prays that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

SHELLY KATZ AND
TIME, INC.
Plaintiffs

v. Law No. #81, 405

CHARLES HENDERSON
Defendant

OPINION AND ORDER OF COURT

On March 29, 1982, a jury verdict was rendered in favor of the Defendant on the Plaintiffs' main claim, and in favor of the Defendant/Counter Plaintiff on the Counterclaim. Judgments nisi were accordingly entered in favor of the Defendant on the main claim and in favor of the Counter Plaintiff and against the Counter Defendants Shelly Katz and Time, Inc., in the amount of Six Thousand Dollars ($6,000.00) with interest from the date thereof and costs. Plaintiff/Counter Defendants timely filed a Motion for Judgment N.O.V., for a New Trial and for Reconsideration of the Judgment. A hearing was held on these motions on April 15, 1982, at which time the matters were taken under advisement.

Plaintiffs filed their Declaration as an action in dentinue seeking the return of fifty-three (53) prints of photographs of the Dallas Cowboy Cheerleaders taken by Plaintiff Katz and published by Time, Inc., in People Weekly magazine, which had purchased the rights for the use of the photographs. The Declaration alleged that the Defendant did not comply with the licensing agreements issued by Time, Inc., and did not obtain permission from Plaintiffs to use or retain the prints. Plaintiffs sought recovery of the property and damages.

Defendant Henderson filed his answer and counterclaim in which he alleged that after receiving the prints he had numerous telephone contacts with Phyllis Grygalin of Time,

Inc., who repeatedly reaffirmed the offer of Katz and Time, Inc., Katz's agent, to license the use of the prints. Henderson, relying on these assurances, devoted time and money toward preparation of a book consisting of photographs made from the subject prints and poetry relating to those prints and authored by Henderson. By letter dated December 24, 1979, Henderson accepted Plaintiff's offer to license, tending a check for Four Thousand One Hundred Twelve Dollars and Fifty Cents ($4,112.50) to purchase non-exclusive publication rights to fifty-one (51) of the prints. By letter dated January 2, 1980, Time, Inc., without justification, rejected Defendant's acceptance and breached the contract. Defendant further alleged that Plaintiffs, while negotiating with Defendant for a non-exclusive license, granted an exclusive license to the subject prints to another party. Defendant sought money damages from the Plaintiffs.

Plaintiffs' principal ground for seeking a judgment n.o.v. or new trial is that Defendant plead that a contract to license was formed by Defendant's written letter of acceptance dated December 24, 1979. The evidence at trial, however, attempted to show that an oral contract was made when Defendant Henderson phoned Phyllis Grygalin on November 30, 1979, and was breached by Plaintiffs during the same conversation when Plaintiffs imposed new conditions on the agreement. Defendant did not plead the oral contract in its counterclaim, and did not attempt to prove at trial the written contract accepted by letter of December 24, 1979, which it had plead in its counterclaim. Thus, according to Plaintiffs, there was a fatal variance between pleadings and proof and the judgment should not stand. According to the Plaintiffs, Defendant determined it could not succeed on the written conditions set forth in Plaintiffs' written offer to license. Plaintiffs further contend that the evidence presented was insufficient to support a finding by the jury that an oral contract existed between the parties.

Plaintiffs, in their memorandum in support of their motions

under consideration here state that Defendant's pleadings gave no notice that the defense to oral contracts, the statute of frauds, would be applicable to the counterclaim. This is simply not true. Defendant, in his opposition to Plaintiffs' Motion of Summary Judgment, plead as follows:

> (O)n November 30, 1979,...Henderson called Ms. Grygalin again, this time to accept Time's offer. He verified the prices and placed a large order with her, for 51 of the 75 prints. After he had thus consummated the contract, Ms. Grygalin attempted to interject a new term...

Plaintiffs' filed a Reply to Defendant's Opposition to the Motion for Summary Judgment which states, "Defendant's opposition to plaintiffs' motion for summary judgement (sic) alleges the existance (sic) of an oral contract." The Reply memorandum than proceeds to controvert those allegations of the existence of an oral contract. Thus it is apparent that Plaintiffs were on sufficient notice of the oral contract theory on which Defendant would rely.

As to Plaintiffs' contention that the evidence presented in support of Defendant's counterclaim was insufficient for the jury to find that an oral contract existed between the parties, we note that the standard to apply in ruling on a motion for judgment n.o.v. is like that of a motion for directed verdict: The court must assume the truth of all credible evidence and of all inferences fairly deducible therefrom, and consider them in the light most favorable to the party against whom the motion is made. If there is any competent evidence, however slight, in support of the right to recover, the case should be submitted to the jury, and a motion for judgment n.o.v. denied. *Miller v. Michalek*, 13 Md. App. 16, 281 A. 2d 117 (1971). We conclude that there was sufficient competent evidence in support of the Defendant's counterclaim to have submitted it to the jury and to deny the motion for judgment n.o.v.

We also find that the verdict rendered was not contrary to

the evidence and the motion for new trial should be denied.

Accordingly, it is this 14th day of July, 1982, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that Plaintiff's Motion for Judgment N.O.V., for a New Trial and for Reconsideration of the Judgment be and the same is hereby denied.

/s/ Robert H. Mason
Associate Judge

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/s/ Margaret S. Owns
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July 14, 1982

APPENDIX B

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
No. 1458
September Term, 1982

SHELLY KATZ, ET AL

v.

CHARLES HENDERSON

Liss,
Bishop,
Getty,
JJ.

Per Curiam

Filed: July 5, 1983

This appeal arises from a dispute between Time, Inc. and Shelly Katz, a free lance photographer, the appellants, and Dr. Charles Henderson, publisher of a trade journal, the appellee. The subject matter of the suit is approximately seventy-five photographs of the Dallas Cowboy Cheerleaders. The photographs were taken by Katz and obtained by Dr. Henderson from Time, Inc., for inclusion in a journal that Dr. Henderson was writing. The final product was to include poetry and photographs of the cheerleaders.

Several of the photographs initially appeared in the November 28, 1977, issue of People Weekly, a Time, Inc., publication. Photographs published in People Weekly are generally available for reproduction by third parties by the execution of license agreement (Form P 3775) issued by People Weekly. Form P 3775 was never sent to Dr. Henderson by People Weekly.

In December, 1977, Dr. Henderson contacted Phyllis Grygalin, syndication manager for People Weekly, requesting that she forward a context sheet (similar to a negative) of all the photographs taken by Katz of the cheerleaders.[1] Miss Grygalin mailed a Xerox copy of one thousand photographs and Dr. Henderson ordered and paid for seventy-five eight by ten prints, selected from the context sheet. The prints were sent to Dr. Henderson together with transmittal Form No. 3776. The pertinent terms and conditions of Form 3776 are:

> "THIS IS NOT AN INVOICE OR PERMISSION FOR USE.
>
> 1. A license fee is payable upon a written confirmation* to People Weekly of the customer's definite intention to reproduce particular

[1]People Weekly also acts as agent for the photographer in licensing photographs for reproduction.

photograph(s) ordered from People Weekly. An inoice will be sent promptly after receipt of confirmation and payment will be due *immediately* upon receipt of the invoice. Any other terms of payment must be arranged prior to confirmation.

2. ALL TRANSPARENCIES AND PRINTS REMAIN THE PROPERTY OF PEOPLE WEEKLY AND MUST BE RETURNED IMMEDIATELY AFTER USE, OR, IF UNUSED, IMMEDIATELY AFTER SELECTION IS MADE...

...

4. People Weekly makes no representation or warranty with respect to utilization of the names and likenesses of individuals or trademarks depicted in the photographs, and Licensee will itself obtain whatever permission may be required for reproduction.

5. In the event of unauthorized use, Licensee agrees to pay People Weekly double the normal license fee for such use, and any damages People Weekly may incur.

* *Within 30 days*, please designate which photographs you will use, *countersign the attached copy, and return to confirm your order*; written permission for use will follow."

Dr. Henderson was unable to make a final determination of the prints he intended to use in his book within the thirty days required by Form 3776. He requested that the time be extended and Miss Grygalin concurred. Dr. Henderson testified that he telephoned Miss Grygalin a second time in March, 1978, to advise her that he had not made his final selections and her reply was "sometimes these things take up to a year." Dr. Henderson interpreted this to mean that he had a year to negotiate the purchase of the prints.

Dr. Henderson was unable to obtain a publisher for his book. He testified that his unsuccessful attempts to get the book published were

> "primarily because I had not completed the book. In other words, I had three or four poems and wasn't ready to go. So since I could not obtain a publisher by fall of '78, I decided then to go directly to the Dallas organization to talk to them."

The response from the cheerleaders' advertising agency, William Morris Agency, was that the poetry did not comply with the cheerleader's image.

On August 1, 1979, Miss Grygalin sent Dr. Henderson a letter marked "Second Notice" inquiring about the seventy-five prints.[2] The letter stated, in pertinent part:

> "We would appreciate if you would return this material to our office and let us know whether or not it was used so that we can settle this matter promptly. P.S. Please be sure to return print C-29/29A."

Print C-29/29A, was a "high kick" print that the cheerleaders determined was "unladylike", and they did not want it to be republished. Dr. Henderson intended to use this print, because it was illustrative of the final segment of the cheerleaders' routine. He had been advised by Miss Grygalin early in 1978, however, that print No. C-29/29A could not be included in his publication.

On November 26, 1979, Dr. Henderson telephoned Miss Grygalin stating that he was ready to produce his book and he requested that he be permitted to pay the same price quoted two years earlier for the final fifty photographs he had selected. A second telephone conference took place on November 30, 1979. During that conversation Miss Grygalin testified that she advised Dr. Henderson that the original prices would apply, but two conditions were to be met. First, Dr. Henderson must

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[2]Miss Grygalin testified that the "First Notice" was sent in January, 1979. Dr. Henderson denied receiving any letter prior to August, 1979.

obtain the permission of the cheerleaders and, secondly, the "high kick" print could not be used. Dr. Henderson's version of the conversation was that Miss Grygalin did not say he could not use the "high kick" print, but he must contact the photographer if he intended to use it. Irrespective of which version of the conversation of the 30th is correct, one thing is clear, further authorization was required for the use of the "high kick" print.

Dr. Henderson contacted Shelly Katz on or before December 3rd regarding the use of the prints. Katz, according to Dr. Henderson, offered to show the proposed book to Suzanne Mitchell, Director of the cheerleaders. On December 7th, Dr. Henderson telephoned Miss Grygalin complaining about the two conditions attached to the sale of the rights to the prints. He was again advised to contact Shelly Katz who owned the prints. All subsequent efforts by Dr. Henderson to obtain the rights to the prints from Shelly Katz and to interest the Dallas Cowboy organization in his publication were in vain.

Approximately one month after the rejection of his work by Katz and the cheerleaders, Dr. Henderson sent People Weekly a check for $4,112.50 representing the purchase of North American Rights for a one time use of the prints, including the "high kick" photo, in one edition of his trade book. Dr. Henderson alleges that this was based upon the oral contract of November 30th with Miss Grygalin acting on behalf of People Weekly. On January 2, 1980, Dr. Henderson received a rejection of his order from Time, Inc., based upon the failure to return the "high kick" print. In February, Dr. Henderson relucantly agreed to forego use of the controversial print, but was advised that his offer was too late, because Shelly Katz, who was then the official photographer for the cheerleaders, had sold the rights to all of his photographs to this new employer, the cheerleaders.

Undaunted by this turn of events, Dr. Henderson expended considerable time and money composing a sample copy of his book for presentation to the Dallas Cowboy organization. The sample was presented in June, but was not accepted. The

appellant, Katz, then filed an action in detinue to recover the photographs and Dr. Henderson responded with a counterclaim alleging the existence of a written contract on December 24, 1979, and a breach by People Weekly on January 2, 1980.

Interestingly, Dr. Henderson's suit alleged a written contract (based upon his tender of a check for $4,112.50 on 12/24/79) and a breach by Time, Inc. on January 2, 1980, (letter of rejection), but at trial he relied upon the oral conversation with Miss Grygalin on November 30, 1979, as the formation of the contract. Appellants' motions for summary judgment under Md. Rule 610 were denied by the court prior to a hearing on the merits. Both parties filed a motion for directed verdict under Md. Rule 552 at the conclusion of the trial; the Court (Mason, J.) denied both motions. The jury returned a verdict denying the claim of Time, Inc. and Katz for a return of the 53[3] photographs and awarded Dr. Henderson the sum of $6,000 damages for breach of contract. Appellants' motion for judgment *n.o.v.*, was denied by the court; this appeal followed.

The appellants raise the following issues:

2. Whether the trial judge erred when he denied appellants, motion for judgment *n.o.v.* or for a new trial, because of the variance between the allegation of a written contract and the attempted proof of an oral contract?

3. Whether the trial judge erred in denying appellants' motion for reconsideration of the judgment, because no damages were incurred in reliance on the contract?

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[3]Dr. Henderson returned 22 prints to People Weekly.

The general rule by which the sufficiency of the evidence is to be tested on appellate review is the same for a judgment *n.o.v.* and a directed verdict; that is, the evidence and the reasonable inferences to be drawn from it are to be considered in the light most favorable to the party opposing the motion. *Impala Platinum Ltd. v. Impala Sales, Inc.*, 283 Md. 296 (1978). Considering the testimony most favorably to Dr. Henderson, we hold that the evidence was not legally sufficient to warrant submission of the case to the jury on the issue of damages for breach of an oral contract between People Weekly and Dr. Henderson.

By his own testimony Dr. Henderson has established that he initiated the inquiry into the photographs held by People Weekly in the month of December, 1977. An order form (P3776) was required to be returned to People Weekly within 30 days after the photographs were received for inspection by the prospective purchaser. Dr. Henderson requested and received an extension on two occasions in February and March, 1978.

In January, 1979, Miss Grygalin raised the issue of the use of the "high kick" print. By letter dated August 1, 1979, People Weekly requested the return of all the photographs, emphasizing the necessity of returning C29/29A, the "high kick" and inquiring if any of the photos had been used.

During the November 30th telephone conversation, Dr. Henderson inquired if it was still possible to purchase rights and if the lower 1978 prices could be applied. Miss Grygalin agreed to the sale of the rights to reproduce the photos and the rates, but indicated that if Dr. Henderson intended to use the "high kick" print he must contact the photographer, Shelly Katz.

An essential feature of every contract is the parties' mutual assent. *Klein v. Weiss*, 284 Md. 36(1978), *Canaras v. Lift Truck Service, Inc.*, 272 Md. 337 (1974). That assent in crystallized when there is a knowing and sufficient acceptance to a certain and definite offer. *Peer v. First Fed. S & L Assn.*, 273 Md. 610 (1975). At the time Dr. Henderson alleges the formation of a

contract, November 30th, there existed no certain and definite offer. Miss Grygalin, by Dr. Henderson's own admission, indicated that the "unladylike" print could not be used unless the photographer consented. Dr. Henderson would have us accept his conclusion that a contract was formed and immediately breached by Miss Grygalin's introduction of an additional condition, i.e. return of the "high kick" print. We are not aware of any authority, and the appellee has not provided us with any, to the effect that one party to a conversation can excise part of the discussion, allege a contract as to the remainder and treat the excised portion as a breach of the alleged contract. Patently, there is no such authority.

In *Maryland Supreme Corp. V. Blake Co.*, 279 Md. 531 (1977), the Court of Appeals (Orth J.)) stated:

> "(a) mere expression of itention to do an act is not an offer to do it, and a general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer. Thus, a mere quotation or a statement of a price or prices and an invitation to enter into negotiations, are not offers which may be turned into binding contracts upon acceptance."

Maryland Supreme is apposite here. Miss Grygalin, on behalf of People Weekly and Time, Inc., was willing to negotiate the sale of the rights to certain prints, but Dr. Henderson was fully apprised that any conset to use the "high kick" print needed to be obtained from the owner of the photographs, Katz. The telephone conversation did not, as a matter of law, amount to an oral offer and oral acceptance creating an enforceable contract.

When an offer is accepted subject to a condition or reservation, neither party is bound to an agreement until the condition or reservation has been withdrawn or satisfied. *Orient Mid-East Great Lakes Service v. International Export Lines*, 315 F. 2d 519 (4th Cir. 1963); *Della Ratta, Inc. v. American*

Better Community Developers, Inc., 38 Md. App. 119 (1977). As of November 30, 1979, when the appellee alleged that he accepted Time, Inc's. offer:

1. No written confirmation was received by People Weekly of appellants' intention to reproduce designated photographs.
2. No invoice had been forwarded by People Weekly setting forth the actual price for the photographs to be selected.
3. No written permission for use (Form P 3775) was sent by People Weekly as set forth in Form P 3776.
4. The prints were not returned after selection by appellee to People Weekly as required by Form P 3776.
5. Permission to use print C29/29A had not been obtained from Shelly Katz.
6. Print C29/29A had not been returned as required in the telephone conversation of November 30th.

Clearly, no mutual intention to conclude an oral contract existed.

Dr. Henderson's subsequent efforts to obtain the permission of Shelly Katz and the cheerleaders to authorize the release of all the prints indicates that he recognized that the licensing of the photographs by People Weekly was conditioned upon his obtaining the approval of the photographer and the cheerleaders. Being unsuccessful therein, he attempted to ignore the condition precedent to licensing by People Weekly and, on December 24th forwarded a letter including a check that he determined to be sufficient to cover the cost of the prints he desired to use in his trade journal. None of this activity is in accord with the procedure established by People Weekly in licensing photographs. When this offer, which is in effect a counter proposal, was rejected, he claimed a breach of contract by Time, Inc.

The contemporaneous writings of the parties establish that a contract did not exist on November 30th. On the same day Dr. Henderson wrote Shelly Katz:

> "Mrs. Grygalin informed me that the photo in question requires your permission before the rights can be sold for other publications. I would like to obtain the rights to use that photo as well as other photos taken in connection with that article."

A second letter to Katz from Dr. Henderson dated December 8th requested, for the second time, permission to use the photographs in order that he could obtain a license from Time, Inc. to reproduce the prints. "Nothing is more indicative of the intent of the parties to a transaction than their interpretation of their own words and acts." *Orient Mid-East Great Lakes Service v. International Export Lines*, supra. We hold that a contract did not exist between the parties on November 30, 1979, or at any other time. The trial court erred in failing to grant appellants' motions for directed verdict as to the return of the photographs to People Weekly and as to the counterclaim filed by the appellant upon an illusory oral contract.

It is unnecessary for us to discuss the issue of variance between the written contract alleged and the oral contract relied upon at trial. Likewise, it is unnecessary to address the issue of damages sustained by Dr. Henderson. On the damage issue, however, we point out that *Dialist v. Pulford*, 42 Md. App. 1973 (1979), relied upon by the appellee herein to establish reliance damages, is applicable only to those situations where a valid contract exists, a breach occurs and the non breaching party is entitled to recover expenses incurred in reliance on the contract. In the present case, Dr. Henderson alleged a contract

was formed November 30th and breached immediately or nor later than January 2, 1980. The expenses incurred in the production of his book, prior to November 30th and subsequent to the breach, therefor, could not be considered as damages sustained in reliance on the contract.

JUDGMENTS REVERSED.
Costs Assessed to Appellee.

APPENDIX C

MANDATE

Court of Special Appeals of Maryland

No. 1458, September Term, 1982

SHELLY KATZ, ET AL

v.

CHARLES HENDERSON

December 27, 1982—Line dismissing cross-appeal of Charles Henderson only.

July 5, 1983—Per Curiam filed. Judgments reversed. Costs assessed to appellee.

August 4, 1983—Motion for Reconsideration filed by appellee.

September 5, 1983—Motion for Reconsideration denied.

September 13, 1983—Mandate issued.

MANDATE Continued

STATEMENT OF COSTS:

In Circuit Court: for Prince George's County

Record	25.00
Stenographer's Costs	595.00

In Court of Special Appeals:

Filing Record on Appeal	30.00
Printing Brief for Appellant	345.60
Reply Brief	
Portion of Record Extract—Appellant	268.80
Printing Brief for Cross-Appellee	
Printing Brief for Appellee	130.83
Portion of Record Extract—Appellee	
Printing Brief for Cross-Appellant	

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the state Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affix the seal of the Court of Special Appeals, this thirteenth day of September, A.D. 1983

/s/ Howard E. Friedman

Clerk of the Court of Special Appeals of Maryland

Costs shown on the Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

APPENDIX D

CHARLES HENDERSON

v.

SHELLY KATZ et al.

In the Court of Appeals of Maryland

Petition Docket No. 470 September Term, 1983

(No. 1458, September Term, 1982 Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: December 1, 1983.

APPENDIX E

PERTINENT RECORD EXTRACTS

Plaintiffs/Respondents' Declaration in the Circuit Court for Prince George's County Maryland:

> Prayer No. 6. "For an order to restrain defendant from selling, printing or publishing, or being in any way connected in the selling, printing or publishing, or otherwise disposing of any said photographs, prints or copies thereof;"

Defendant/Petitioner's Answer and Counterclaim:

> Counterclaim No. 4. "Plaintiff's rejection of defendant's acceptance was a willful violation of defendant's rights under the First Amendment to the U.S. Constitution and Article 40 of the Maryland Declaration of Rights."